PUBLIC PROSECUTOR v. LIM KUAN HOCK

[A.Cr.J. (Ong Hock Sim J.) March 30, 1967]

[Penang — Criminal Appeal No. 5 of 1967]

Penal Code, ss. 392 & 397 — Armed robbery — Identification parade — Defence of alibi — Best evidence should be produced and tested.

Criminal Law and Procedure — Acquittal — Appeal against — Weight of evidence.

The respondent was charged with another with the offence of armed robbery contrary to sections 392 and 397 of the Penal Code. The learned president while accepting the identification by witness of the accused at an identification parade, and noting in his record that he had no doubt that the "accused took part in the robbery" held that the defence had cast a reasonable doubt on the prosecution story." The defence case was an *alibi*.

Held: (1) although the onus was on the prosecution throughout to prove the guilt or innocence of the accused, in this case as it was on record that upon identification the learned president had said he had no doubt the accused took part in the robbery, therefore, it would require very solid grounds to hold that the defence had cast a reasonable doubt on the prosecution story;

(2) on the evidence the accused-respondent ought to have been convicted as the best evidence of the *alibi* was not produced and tested.

Cases referred to:—

(1) *R.* v. *Burdett* (1820), 4 B. & Ald. 95, 121.

(2) *R.* v. *Low Toh Cheng* [1941] M.L.J. 1.

CRIMINAL APPEAL.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the appellant.

S. Natha Singh for the respondent.

Ong Hock Sim J.: The respondent in this case was charged before the Senior President, Sessions Court at Penang as follows:—

"That you with Kong Chye alias Kong Fan Hooi and two other male Chinese still at large, on 14th December, 1965, at No. 23, Heah Swee Lee Grove in Cheeseman Road area, in the District of George Town, in the State of Penang, robbed Madam Kanya Eamakedul of cash, jewellery and one Phillips tape recorder with tape the total value of $4,050 and at the time of committing the robbery, you and the said Kong Chye alias Kong Fan Hooi and the two other male Chinese were armed with deadly weapons, to wit, knives and daggers, and thereby you have committed an offence punishable under section 392 and 397 of the Penal Code."

At the conclusion of the trial the respondent was acquitted and discharged. The Public Prosecutor appealed against the order of acquittal.

I allow the appeal and I set aside the order of acquittal made by the learned president and substitute therefor a conviction of the accused upon the offence as charged.

The reasoning of the learned president is incomprehensible in this case. He accepted the identification by P.W.2 of the accused at an identification parade some 9 months after the offence and said:—

"I had no doubt that P.W.2 had not made a mistake when picking out the accused at the identification parade as one of the intruders even though she was brought before it more than nine months after accused was last seen by this witness. She had ample opportunities of seeing him from the top of the stairs that day, at the landing when she was asked about the whereabouts of her jewellery by the accused and also just before accused left the house while waiting for the other intruder."

He was satisfied further that the identification parade was properly conducted. The ring which was pawned by the accused was of a rare design made in Thailand. The ring which was also identified by the complainant had been pawned by the accused. That, coupled with the identification of him at the scene seemed beyond doubt to point to his guilt and it is a little strange that the learned president should permit himself to be so gullible as to believe D.W.2 who was called at the trial to testify and to corroborate the accused in what I would consider a concocted *alibi* and to credit her with ability to remember something so inconspicuous and happening over 12 months ago, (the trial was in February, 1967, the offence took place in December, 1965) as that the accused was working with her on the day in question and therefore could not have been at the robbery on the 14th December, 1965 because the accused never missed a day of work in December, 1965 and worked with her from 9 a.m. to 10 p.m. every day. No ground for remembering that day is given by D.W.2 and she even recollected that only she and the accused were working that day but when asked when Kong Chye came to see accused at his place of work, she said "I cannot remember dates". For $3 a day from 9 a.m. to 10 p.m. each day with short breaks for food seems to me somewhat like slave labour. Certainly this story is a little incredible.

"Any sort of explanation would not be acceptable. It must be reasonable. . . . The question which arises for consideration is whether the explanation given is inherently or palpably false or such as to cast a reasonable doubt as to the guilt of the accused." — *Sarkar* on Evidence, 10th Edition at p. 905.

The one who could have given evidence in favour of the accused was the convicted person who would have had no axe to grind. He had been duly sentenced. He could have testified that the accused was not one of the persons who was with him on the 14th of December, 1965 at No. 23, Heah Swee Lee Grove in Cheeseman Road. He could have testified that he gave the ring to the accused to pawn. It is true that the onus is on the prosecution throughout to prove the guilt or innocence of the accused person. It is on record that upon the identification the learned president had said he had no doubt accused took part in the robbery. It would therefore require very solid grounds now to hold that defence had cast a reasonable doubt on the prosecution story.

In *R.* v. *Burdett*,[1] Best J. observed at p. 121:—

"It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating

general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just."

The defendant's case is an *alibi*. What has been adduced by him in the lower court was not in my view adequate to rebut the positive evidence of identification given by the victim of the robbery. The learned president failed to consider that in too readily accepting the purported *alibi* which no doubt was decided upon some 12 or 14 months after the event when nothing of any particular significance happened to fix the minds of these two people to the particular time and date that he failed thereby to give due regard to the prosecution case. It is not sufficient for him to say that this person or that person impressed me as a truthful witness. He must consider has the explanation given by the defence cast a reasonable doubt and has it been satisfactorily proved. Was the best evidence of the *alibi* produced and tested? The failure to call Kong Chye who was identified in court by the accused himself seems to me something which the learned president should take into consideration in weighing the credibility of the evidence both of the accused and his witness as to his presence or absence at the scene of the robbery on the day in question.

It is rare that an appellate court interferes with a finding of fact by the trial court but that it has power to do so cannot be disputed. Following *R.* v. *Low Toh Cheng*,[2] I would say having reviewed all the evidence in the case, and having formed an opinion of its weight and reliability different to that of the learned president I have unhesitatingly come to the conclusion that the accused ought to have been convicted.

I sentence the accused to two years imprisonment.

Order accordingly.

Solicitors: *Natha Singh & Subbiah.*

NEO ENG v. ONG HAI KIAT & ORS.

[O.C.J. (Choor Singh J.) April 6, 1967]

[Singapore — Civil Suit No. 953 of 1966]

Landlord and Tenant — Death of original tenant — Intestacy — Contractual tenancy vesting in Chief Justice — Notice to quit — Claim for possession — Former proceedings — Estoppel — Meaning of "premises" — Whether domestic premises — Whether tenant residing in premises — Control of Rent Ordinance (Cap. 242), s. 16(c).

The plaintiff claims from the defendants possession of land and buildings comprised in Lot 50 of Mukim 17. The plaintiff is owner of the Lot 50 and also the adjacent Lot 49, both of which were acquired by him at different times. The previous owner of Lot 50 let it in 1942 to one *THH* who erected a building partly on Lot 50 and partly on Lot 49. During his lifetime *THH* carried on a charcoal and firewood business on the premises and when he died in 1959, he was survived by his widow and his son the fifth defendant. From 1959 onwards the licence to carry on the business was in the fifth defendant's name. *THH* died intestate and no representation to his estate was taken out. On January 1, 1964, the first four defendants entered into the occupation of the premises in pursuance of a partnership agreement between them and the fifth defendant. In 1964, the plaintiff commenced proceedings in the district court against the first four defendants for possession and trespass. The action was dismissed and his appeal was also dismissed. By a notice to quit dated November 29, 1965 and served on the Chief Justice of Singapore, the tenancy of *THH* was determined as from November 31, 1965. A copy of such notice was also served on the defendants. The present proceedings were commenced on June 1, 1966. The first four defendants concede that they stand or fall with the fifth defendant.

Held: (1) the proceedings in the district court were commenced by the plaintiff before determining the contractual tenancy of the premises and there was therefore no question of the defendants' being trespassers. The present proceedings were commenced after the contractual tenancy had been determined by notice to quit and the plaintiff is not estopped from claiming for possession of the premises from the defendants;

(2) Lots 49 and 50 are both owned by the plaintiff and therefore the entire building stands on land owned by the plaintiff. As long as it is the subject of a single letting it is immaterial whether the building stands on one or more lots of land. The premises in question are premises within the meaning of the Ordinance;

(3) there is clear evidence that the business of timber merchants is being carried on in the premises. The fifth defendant sleeps on the premises in order to look after the stock-in-trade. The fifth defendant's family live in another house nearby. The premises are used substantially for business purposes and cannot be considered as domestic premises merely because some person or persons sleep on the premises. What is being fought for is not a roof over a widow and children but the right to continue the business of timber merchants. The premises are not domestic premises within the meaning of the Ordinance;

(4) the tenant having died and no representation to his estate having been made, the contractual tenancy vested in the Chief Justice. That contractual tenancy having been terminated by the notice to quit, no one else has a right to be on the premises;

(5) the fifth defendant does not reside on the premises within the meaning of the Ordinance and he cannot claim the protection of section 16(c) of the Ordinance. The plaintiff is therefore entitled to an order for possession.

CIVIL SUIT.

K. E. Hilborne for the plaintiff.

N. A. Christopher for the defendants.

Cur. Adv. Vult.

Choor Singh J.: In this action the plaintiff claims from the defendants possession of the land and buildings thereon comprised in Lot 414[50] of Mukim 17.

The following facts are not in dispute. The